Supreme Court, U. S.
FILED
APR 22 1972

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-366

TIDEWATER OIL COMPANY

Petitioner,

vs.

UNITED STATES OF AMERICA and PHILLIPS PETROLEUM COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Petitioner Tidewater Oil Company

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OPINION

The opinion of the court below is its one sentence order plus one citation. It is not reported but is set out as Appendix 2 hereto.

No formal opinion was rendered by the district court, but pertinent excerpts from the reporter's transcript of its oral remarks are in Appendix E to the Petition for a Writ of Certiorari.[1] Its earlier opinion on another phase of the case appears in *United States v. Phillips Petroleum Company and Tidewater Oil Company,* 1966 Trade Cas. ¶ 71,872.

All emphasis in quotations has been added, unless otherwise stated.

1. Incorporated by reference at p. 24 of the single Appendix here.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The district court had jurisdiction under the Clayton Act, §§ 7 and 15, Act of October 15, 1914, c. 323, 38 Stat. 731, 736, as amended, 15 U.S.C. §§ 18 and 25.

The jurisdiction of the Court of Appeals is the question in issue, under 28 U.S.C. § 1292(b). Its order was rendered July 28, 1971. The petition for certiorari to review that order was filed on September 14, 1971 and was denied on November 9, 1971. On January 21, 1972, petitioner filed a Motion for Leave to File Out-of-Time Petition for Rehearing and Petition for Rehearing of Order on Petition for a Writ of Certiorari because the Seventh Circuit had decided the identical question in *Fisons Limited and Fisons Pharmaceuticals, Ltd. v. United States of America*, ... F.2d .....,[2] 1972 Trade Cas. ¶ 73,790 (Jan. 5, 1972), in direct conflict with the court below. The Solicitor General advised the Court that the "resolution of this conflict is of general and continuing importance to the proper implementation of the nation's antitrust policy." On March 20, 1972, the Court granted the motion, vacated its order of November 9, 1971, and granted the petition for certiorari.

QUESTION PRESENTED

In a civil antitrust action brought in a district court by the United States, does a Court of Appeals have jurisdiction to entertain a petition for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the district court which certifies that it involves a controlling question of law as to which there is substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation?

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2. Not yet reported. A copy of the opinion is attached to the Petition for Rehearing.

STATUTES INVOLVED

Section 7, Clayton Act, Act of Oct. 15, 1914, c. 323, 38 Stat. 731, as amended, 15 U.S.C. § 18:

> "* * * no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

28 U.S.C. § 1292(b) (Interlocutory Appeals Act, 1958):

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

The Expediting Act of 1903, Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended (15 U.S.C. § 29):

> "In every civil action brought in any district court of the United States under any of said [Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

STATEMENT OF THE CASE

In March, 1966, petitioner ("Tidewater") contracted with Phillips Petroleum Company ("Phillips") to sell a portion of its western assets to Phillips. At the request of the Antitrust Division of the Department of Justice, Tidewater and Phillips voluntarily

postponed the consummation from the agreed date, June 30, to July 14, 1966. On July 13 the United States filed a complaint in the district court in Los Angeles against Phillips and Tidewater, assailing the proposed acquisition by Phillips as violative of Clayton Act, Section 7, and applied for a temporary restraining order against the consummation of the transaction. Because of absence of the judge, the application could not be heard until after the hour set for consummation the next day. Tidewater and Phillips, "in deference to the Court, delayed the closing of the transaction pending the Court's judicial determination." The court "denied the requested restraining order, thus permitting the transaction to be closed." Later, after receipt of extensive evidence, plaintiff's motion for a preliminary injunction was denied with opinion (1966 Trade Cas. ¶ 71,872) and upon a full set of findings.[3]

Restraint having been denied, Tidewater sold the agreed assets and transferred title to Phillips. The case then proceeded as one to compel divestiture by Phillips of the acquired assets, and Tidewater was wholly inactive in the case except to respond to plaintiff's discovery. When eventually plaintiff informed the district court that it had completed its discovery and was ready to go to trial, Tidewater moved to dismiss, as against it,[4]

> "on the ground that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."

The district court denied the motion but volunteered a certification for interlocutory appeal under 28 U.S.C. § 1292(b), because of

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3. Those findings are set out in App. C to the petition for certiorari, incorporated by reference at p. 24 of the single Appendix hereto, and are the source of the facts stated above.

4. Its motion is set out in App. D to the petition for certiorari, incorporated by reference at p. 24 of the Appendix here.

the importance of the question and doubt as to the correctness of its decision. Its formal order[5] on the motion, June 24, 1971, contained the certification. Within the ten days provided by that section, on June 30, 1971, Tidewater filed its petition in the court below for permission to appeal under 1292(b) (Appendix 3, p. 4).

On July 28, 1971, that court denied the petition by a one sentence order and opinion (Appendix 2):

> "The petition for leave to appeal under 1292(b) is denied. *United States v. Ford* [*sic "Food"*] *Machinery Corporation*, 9 Cir., 321 F.2d 534."

The appeal in the cited case (the correct designation of which is *United States v. FMC Corp.*, 321 F.2d 534) was "taken [by the United States] under 28 U.S.C. § 1292(a)(1) from an order denying a motion for a preliminary injunction". After stating the nature of the case and of the appeal, the opinion and order there said:

> "We are of the opinion that we lack jurisdiction of this appeal, by reason of the provisions of the Expediting Act of 1903 (c. 544, 32 Stat. 823) now 15 U.S.C. § 29. See [citations]. We are unable to agree with the contrary decision of the Third Circuit in United States v. Ingersoll-Rand Co., 1963, 320 F.2d 509 (June 5, 1963)."

Thus the reason for denying Tidewater leave to appeal here was solely the belief that the Court of Appeals lacked jurisdiction. The writ of certiorari has issued to review that determination.

ARGUMENT

We submit that Courts of Appeals do have jurisdiction to entertain appeals under 28 U.S.C. § 1292(b) in government antitrust suits.

Three circuits have decided the precise question, the Ninth in this case, the District of Columbia Circuit in *Farbenfabriken Bayer*,

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5. Appendix B to petition for certiorari, also found at pp. 14-15 of the Appendix here.

A. G. v. United States, 1968 Trade Cas. ¶ 72,570, cert. den. 393 U.S. 959,[6] and the Seventh Circuit in *Fisons Limited and Fisons Pharmaceuticals, Ltd. v. United States of America,* ..... F.2d ....., 1972 Trade Cas. ¶ 73,790. The Ninth and the District of Columbia Circuits held that Courts of Appeals lack jurisdiction but without analysis or discussion; their orders merely contained bare citations. The Seventh Circuit analyzed the question in a careful opinion and reached the opposite holding. The First Circuit in *United States v. Cities Service Company,* 410 F.2d 662, 670 (1969), has expressed dictum in favor of appealability under § 1292(b).

This Court has often observed how much its work is eased by having cases screened through the Courts of Appeal. *United States v. Ballard,* 322 U.S. 78, 88 (1944); *United States v. Sheridan,* 329 U.S. 379, 392 (1946). By the time § 1292(b) was first enacted (in 1958), doubt was growing about the wisdom of departing from that practice in antitrust cases and in routing them directly to this Court. Thus, in *United States v. Singer Manufacturing Co.,* 374 U.S. 174, 175n (1963), the Court said:

> "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. * * * Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."

Expedition, it was coming to be believed, was better secured by screening cases through the Courts of Appeals. Mr. Justice Clark had made similar observations in a concurring opinion, *Brown Shoe Co. v. United States,* 370 U.S. 294, 355, 364 (1962), as had Mr. Justice Harlan in *United States v. Borden Co.,* 370 U.S. 460, 477 (1962). Just recently the Chief Justice, in *Ford Motor Co.*

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6. The Solicitor General has also cited an unreported order of the District of Columbia Circuit in *Glaxo Group, Ltd. v. United States,* Misc. No. 3261 (June 25, 1963).

v. United States, U.S. , 92 S.Ct. 1142, 1972 Trade Cas. ¶ 73,905 (March 29, 1972) observed, albeit in a dissenting opinion:

> "This case illustrates the unsoundness of the direct appeal permitted in cases of this kind under 15 U.S.C. § 29. In a factually complicated case like this, we would be immeasurably aided by the screening process provided by a Court of Appeals review. Limited expediting of such cases, under the discretion of this Court, would satisfy all needs justifying direct review in this Court."

Courts cannot create an appellate jurisdiction not created by Congress, however desirable, but what Congress has conferred they should not reject. 28 U.S.C. 1292(b) is a modern innovation serving the desirable purpose and enacted over 50 years after the Expediting Act. That section manifests a break with traditional notions and expresses the entirely modern view that interlocutory appeals on important issues are a useful updating of judicial administration. Yet, if no such appeal can be taken to a Court of Appeals under § 1292(b) in a government antitrust suit, that useful device is denied to government antitrust litigation, for no statute provides for an interlocutory appeal directly to this Court.

It is imperative to observe that two entirely different kinds of interlocutory appeals are provided by the judicial code, each with a different language, history and purpose. The first and earliest in time is covered by 28 U.S.C. § 1292(a) and relates to certain collateral proceedings in a case—orders granting or denying interlocutory injunction or relative to receiverships.[7] The second is

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7. Apart from certain patent and admiralty matters.
§ 1292(a) reads:
"(a) The courts of appeals shall have jurisdiction of appeals from:
"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or

provided for in 28 U.S.C. § 1292(b) and relates, not to collateral matters, but to important questions in the direct stream of the case, which, if properly determined early, will save time and energy of courts and litigants.

The history of § 1292(a) has led some courts to deny jurisdiction of appeals under that section to Courts of Appeals in government civil antitrust actions. The citation in the order of the court below shows that it assumed an identity of the question of appealability under § 1292(b) with that of appealability under 28 U.S.C. § 1292(a). This also appears as the basis of decision of the District of Columbia Circuit. As we shall show, there is no such identity. Section 1292(a) is an old provision with a long history and a certain purpose. 1292(b) is an innovation in the law. Its language, history and purpose are totally different. And the question is whether anything in *that* language, history and purpose defeats its salutary application.

The Language of § 1292(b) Clearly Confers Jurisdiction on the Court of Appeals

The necessary place to start, if not to end, analysis is the language of the pertinent statutes.

The Expediting Act of 1903 (15 U.S.C. § 29) provides that in civil actions by the United States under the antitrust acts,

> "an appeal from the *final judgment* in the District Court will lie only to the Supreme Court."

28 U.S.C. § 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable . . . [shall make the proper certification] * * * The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . ."

Thus, § 1292(b) by its language applies to *any* civil action, and the Expediting Act relates only to appeals from *final* judgments.

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modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property:"

"A civil action" is all inclusive. It includes government antitrust cases. The Expediting Act carves out no exception, for that Act relates only to final judgments, while 1292(b) relates only to interlocutory orders. The Seventh Circuit pithily put it this way in the *Fisons* case:

> "By its terms, § 2 of the Expediting Act applies to appeals from final decrees in a limited category of cases. The Interlocutory Appeals Act of 1958 makes no reference to final orders and its language is applicable to all civil litigation in the federal district courts. * * *
>
> "A plain reading of the two statutes reveals no inconsistency between them. If they had been enacted simultaneously, the language of each could be given full effect without limiting the scope of the other. If some conflict in literal meaning did exist, under normal rules of construction the later statute would prevail. *United States v. Wrightwood Dairy Co.*, 127 F.2d 907, 912 (7th Cir. 1942); *Eisenberg v. Corning*, 179 F.2d 275, 276 (D.C. Cir. 1949)." [p. 91,344.]

Thus, looking solely to the language of the two statutes, the Expediting Act is no bar to an interlocutory appeal under § 1292(b).

United States v. Cities Service Company, 410 F.2d 662, 670n (1 Cir. 1969), involved the question whether the Expediting Act precludes an interlocutory appeal to a Court of Appeals under 1292(a), not 1292(b), and held that it did. But it said this, by way of dictum, of 1292(b):

> "It is at least arguable that by its literal terms the certification procedure of § 1292(b) permits interlocutory appeals in government antitrust cases since § 1292(b) covers appeal not otherwise allowed by § 1292(a). *See* Comment, The Antitrust Expediting Act—A Critical Reappraisal, 63 Mich. L. Rev. 1240, 1245n. 48 (1965). Moreover, § 1292(b) appeals do not suspend a consideration of the merits unless a stay is issued by the court of appeals. On the other hand § 1292(b) appeals would involve possible conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court. Unfortunately, the legislative history of

§ 1292(b) provides no illumination on a resolution of these interests."

We show below that there is no "conflict with the policy that government antitrust actions are to be reviewed only in the Supreme Court". Policy means Congressional intent, and that must be gathered in the first instance from statutory language. The supposed "possible conflict" referred to in the quotation is derived from the history, purpose and language of interlocutory appeals under what is now 1292(a), and that, as we show by a brief review below, is completely inapplicable.

Purpose of Section 1292(b).

The conclusion mandated by the language of § 1292(b) is supported by its purpose. That statute, enacted in 1958, created an entirely new practice. Its genesis and the impetus for its enactment were the recognition that there *are* situations where an interlocutory appeal will expedite litigation rather than impede it. The Senate Report on the bill that became § 1292(b) stated[8]:

> "This legislation results from a considerable study by committees of the Judicial Conference. The legislation itself was introduced at the request of the Administrative Office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. * * * The bill results from a growing *awareness of the need for expedition* of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable".[9] (p. 5256).

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8. Senate Report No. 2434, August 18, 1958, 3 U.S. Code Congressional and Administrative News, 85th Cong., 2nd Sess., at p. 5255.

9. So here; had the district court granted Tidewater's motion to dismiss, its order would have been appealable as final.

> "The committee believes that this legislation constitutes a desirable addition to the existing authority to appeal from interlocutory orders of the district courts of the United States. * * * Any legislation, therefore, appropriately safeguarded, which might aid in the disposition of cases before the district courts of the United States by saving useless expenditure of court time is such as to require the approbation of all those directly concerned with the administration of justice in the United States." (p. 5257).

As a most vivid example of cases calling for interlocutory appeals, the report pointed to antitrust, saying:

> "There are many civil actions from which similar illustrations could be furnished. For example, *in an antitrust action* a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. *Disposition of antitrust cases may take considerable time,* yet upon appeal following final disposition of such cases the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." (p. 5256).[10]

The genesis and impetus of the Expediting Act are exactly the same, namely, to expedite litigation and not impede it. The Expediting Act was motivated by the view that government antitrust cases are of such importance that they should be expedited, *Shenandoah Broadcasting v. Ascap,* 375 U.S. 39 (1963); *United States v. Cities Service Co.,* 410 F.2d 662, 664 (1 Cir. 1969) In reporting the bill that became the Expediting Act, Senator Fairbanks said (36 Cong.Rec., 1679):

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10. The Seventh Circuit, in the *Fisons* case, quoted this passage and said that "with only slight changes, [it] might have been written of the very case before us" (p. 91,344). That is true here.

> "* * * every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object."

It has been remarked: "The general debate whether section 1292(b) would expedite or delay has been decided by Congress when it adopted that provision. Experience with that section has shown the wisdom of the Congressional decision." 5 Harvard Journ. on Legislation 55, 64 (1967).

The provision about appeals is Section 2 of the Expediting Act. Section 1 of the same Act provided that government antitrust cases would be heard by a panel of judges upon the certificate of the attorney general. This is now 15 U.S.C. § 28, which provides for a panel of three. The House Report on the bill[11] explains this provision by quoting a letter of the Attorney General as follows:

> "There are a number of cases now provided by statute where appeals may be made directly to the Supreme Court from the district and circuit courts,
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> * * *
>
> "The class of cases that I suggest should be brought within this rule, it seems to me, is of as great importance as any of those referred to. The suggested provision requiring a full bench of circuit judges *would insure the cases receiving as full consideration before presentation to the Supreme Court as if heard by the United States circuit court of appeals.*"

Permitting interlocutory appeals under 28 U.S.C. § 1292(b) will serve both the purpose of speeding litigation and of giving the case a screening before issues reach this Court. Thus § 1292(b) and the Expediting Act are animated and informed by precisely the same objectives and warranted by precisely the same circumstances. They should be read together as supplementing each other, not read as antagonistic. And if any repugnancies were

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11. House Report No. 3020, 57 Cong., 2nd Sess., January 9, 1903.

present, the later Act would necessarily control all intendments. *United States v. Yuginovich,* 256 U.S. 450, 463 (1921); *United States v. Tynen,* 78 U.S. 88, 92 (1870). The Seventh Circuit summed up thus in the *Fisons* case (pp. 91,344-45):

> "The purpose of the 1958 Act is consistent with the expediting purpose of the 1903 Act. Although it authorizes a departure from the general practice of postponing appellate review until after the entry of a final judgment, such authorization is only for the purpose of materially advancing the ultimate termination of the litigation. The specified procedure must be invoked within ten days and shall not stay proceedings in the trial court unless a judge shall expressly so direct.
>
> "The legislative history of the Interlocutory Appeals Act indicates that it was intended to apply to protracted cases, including antitrust litigation. Indeed, it is fair to infer that its primary efficacy was expected to occur in cases of exceptional magnitude. In sum, the plain language, the purpose, and the history of the Interlocutory Appeals Act of 1958 are all consistent with its application to civil antitrust litigation commenced by the United States."

The court added in a footnote:

> "We recognize that the examples of antitrust litigation referred to in the Senate Committee Report were apparently private cases and that no unambiguous reference to Government litigation appears. The many federal judges who participated in the consideration of the proposed legislation, however, were certainly familiar with appellate procedure in both private and Government antitrust litigation, whether civil or criminal."

The Contrast With the Language and History of 1292(a)

28 U.S.C. § 1292(a) is derived from the Evarts Act of 1891 (Act of March 3, 1891, 26 Stat. 828, § 7). That Act provided as follows:

> "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, *in a cause in*

> *which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals,* an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: * * *."[12]

Since the Evarts Act, as enacted in 1891 and amended in 1900, provided in the plainest possible language for certain interlocutory appeals to a Court of Appeals only in cases "in which an appeal from a final decree may be taken * * * to the circuit court of appeals", and since the Expediting Act deprived the Courts of Appeals of jurisdiction over appeals from final judgments in government instituted antitrust cases, upon enactment of the Expediting Act the language of the Evarts Act ceased to provide for interlocutory appeals.

Thus, at its birth, the Expediting Act plainly deprived Courts of Appeals of jurisdiction over 1292(a) type of interlocutory appeals—the only kind then authorized—in government antitrust suits. The debate has turned on whether subsequent textual changes altered the law on 1292(a) appeals.

In 1906 the Evarts Act was amended[13] to substitute the words "in any cause" for the words "in a cause in which an appeal from a final decree may be taken * * * to the circuit court of appeals". Not until the Act had been amended once again was the question raised, years later, whether the 1906 change expanded the reach of the Evarts Act. Upon the basis of the history of the peculiar purpose and motivation of the 1906 amendment as being to defeat certain evasive tactics in pl..ding, and noting that the amendment was enacted only 3 years after the Expediting Act, yet without referring to it, courts concluded that the 1906 amend-

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12. By the Act of June 6, 1900, c. 803, 31 Stat. 660, the Evarts Act was amended to extend to orders concerning receivers. The language "in a cause in which an appeal from a final decree may be taken * * * to the circuit court of appeals" remained.

13. By the Act of April 14, 1906, 34 Stat. 116.

ment was not intended to work that expansion (see *United States v. Cities Service Company,* 410 F.2d at 666-67).

The phrasing was again changed in 1911 upon codification of various statutes into the Judicial Code. Section 7 of the Evarts Act became Section 129 of the Code (36 Stat. 1087, 1134), and the words "in any cause" were replaced by the words "notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court". The new phrasing did not say "notwithstanding an appeal . . . might, upon final decree . . . be taken *only* to the Supreme Court". In *United States v. Ingersoll-Rand Co.,* 320 F.2d 509, 512 (1963), the Third Circuit held that the 1911 change "assuredly had the effect" of making interlocutory injunctive and receivership orders in government antitrust suit appealable to Courts of Appeal. The First Circuit, in the *Cities Service* case, 410 F.2d at 667, held otherwise, because, while "the language is sweeping", there was "no indication that any substantive change in the Expediting Act was intended. Nor, apparently, was any attempt made to take advantage of the language."

Whether the First or Third Circuits has the better of the reasoning is moot because in 1925, 43 Stat. 936, 937, inaugurating this Court's certiorari jurisdiction, re-codified the Judicial Code and deleted the "notwithstanding" clause of Section 129 of the Judicial Code of 1911. According to a memorandum accompanying the bill, the "notwithstanding clause" was "eliminated as having no further application in view of the repeal of the existing provisions of Section 238 providing for direct appeals."[14] This ambiguous explanation left the situation as it had been, that is, in the context of an Act which, when first enacted in 1903, plainly precluded an interlocutory appeal on injunctions to Courts of Appeal. As said in *Cities Service,* at pp. 668-669, "If the 1911 'notwith-

14. Cited both in *United States v. Ingersoll-Rand,* 320 F.2d at 512, 513, and *United States v. Cities Service Company,* 410 F.2d at 668-9.

standing' language did not create such jurisdiction, then dropping such language because the same coverage could be achieved without it could be no more effective."

The next event was the revision of the Judicial Code in 1948, as Title 28 U.S.C. (62 Stat. 929). The Evarts Act became 28 U.S.C. § 1292(a). As so codified, 1292(a) permits an appeal to a Court of Appeals of interlocutory injunctive and receivership orders "except where a direct review may be had in the Supreme Court". As this Court has review under the Expediting Act only from final judgments, it has none from interlocutory orders. The Third Circuit in *Ingersoll-Rand, supra,* therefore held that the 1948 enactment operated to vest jurisdiction in Courts of Appeals over such interlocutory orders in government instituted antitrust cases. Said it (320 F.2d at 517):

> "In fact, it is extremely difficult and requires doing violence to the language of the statute to escape the conclusion that interlocutory orders, such as the one at bar, are reviewable by a court of appeals excepting and only excepting those types of cases in which interlocutory order is directly reviewable by the Supreme Court."

On the other hand, the First Circuit pointed to the statements in the reviser's notes to the 1948 recodification that no substantial changes were intended by the recodification, and it cited this Court's decision to that effect, *Fourco Glass Co. v. Transmirra Prod. Corp.,* 353 U.S. 222, 227 (1957). Therefore the First Circuit, disagreeing with the Third, held that the 1948 codification effected no change.

In between *Ingersoll-Rand* and *Cities Service,* both containing long discussion, came the decision of the court below in *United States v. FMC Corporation,* 321 F.2d 534 (1963), the basis of its decision in the present case. That case concerned appealability under § 1292(a) to a Court of Appeals of an order denying a preliminary injunction. Without analysis or discussion it stated baldly, "We are of the opinion that we lack jurisdiction of this

appeal, by reason of the provisions of the Expediting Act of 1903". Its authority for this proposition was the several citations we discuss below at pp. 18-24.

Thus, since the 1948 amendment, on appealability in government antitrust suits of interlocutory orders described in § 1292(a), there is conflict among the circuits, the First and Ninth opposed to the Third. The question has never reached this Court.[15]

And in all these cases it has been the Department of Justice that has argued that interlocutory orders under Section 1292(a) are appealable to the Courts of Appeals. It is an oddity that, as respects Section 1292(b), where jurisdiction of the Courts of Appeals is so much clearer, the Department makes an about-face.

Even courts voting against appealability of 1292(a) orders consider that conclusion to be unfortunate[16] but compelled by history. The case against appealability of § 1292(a) orders to a Court of Appeals must rest on the statement in *United States v. California Canneries,* 279 U. S. 553 (1929), repeated in a footnote dictum in *Brown Shoe.*

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15. Inasmuch as the Court of Appeals in *Ingersoll-Rand* affirmed an interlocutory injunction appealed by the defendant, neither party had any incentive to seek review by this Court of the question of appealability. In the *FMC* case, the district court had denied a preliminary injunction against an acquisition, and the United States appealed to the Ninth Circuit. When that court stated that it lacked jurisdiction, the United States applied to Mr. Justice Goldberg for a stay pending a petition for certiorari. When he denied the stay, the acquisition occurred, thus mooting the question so that no petition for certiorari was filed. In his opinion denying the stay (*United States v. FMC Corp.*, 11 L.Ed.2d 20), Mr. Justice Goldberg, not writing for this Court but as a single circuit justice, concluded that the 1948 revision of the Judicial Code had not altered the previous historical construction of the Expediting Act.

16. For example, the First Circuit in the *Cities Service* case, *supra,* remarked (p. 669):

> "We realize that time has made ancient good much less couth than it was in 1903, and that requiring Supreme Court review of final district court actions in government civil antitrust cases and barring any court of appeals review of interlocutory orders make little sense today. The call for another—and hopefully less ambiguous—change in jurisdiction has been sounded on both the judicial and legislative fronts."

We therefore consider those cases and examine whether they have any bearing on appealability under Section 1292(b).

United States v. California Canneries, 279 U.S. 553 (1929), and Its Inapplicability to Interlocutory Appeals Under 28 U.S.C. § 1292(b).

The first fact to note is that *California Canneries* was not an independent suit but arose out of *Swift & Company v. United States,* 276 U.S. 311 (1928), a government antitrust case in which a final decree had been entered in the district court and affirmed. *California Canneries* was a post-judgment proceeding in the *Swift* case. After the *final* decree in *Swift,* California Canneries sought to intervene to vacate that *final* decree, and its motion was denied. On appeal in 1924 the Court of Appeals for the District of Columbia reversed the order denying intervention. On certiorari this Court held that the Court of Appeals had no jurisdiction. In doing so it added in the opinion by Mr. Justice Brandeis (p. 558):

> "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller,* 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

It is to this sentence that the government gives an exaggerated meaning as controlling the question now before the Court. But to attribute that meaning to the sentence is to attribute to Mr. Justice Brandeis' dictum an uncalled for weight. It was dictum because the order appealed from was *not* interlocutory at all. It was a *post-judgment* order, and, as such, historically considered a *final* order for purposes of appeal. A decree, like that in *Swift & Co. v. United States, supra,* that an acquisition is illegal and must be undone, is final for appeal to this Court, although a plan of

divestiture remains to be ordered. *Brown Shoe Co. v. United States,* 370 U.S. 294, 305 (1962). The subsequent order putting a plan into effect is also appealable as a final order. *Cascade Nat. Gas v. El Paso Nat. Gas,* 386 U.S. 129 (1967). So is a subsequent contempt order. *First Security Nat. Bank v. United States,* 382 U. S. 34 (1965). It is the general rule that post-judgment orders are appealable as final orders, unless they too are merely interlocutory to some post-judgment procedure. 9 Moore's Federal Practice (2d ed.) ¶ 110.14, and cases cited. Orders denying interventions after a judgment decreeing an acquisition to be illegal are appealable directly to this Court as final orders. *Cascade Nat. Gas v. El Paso Nat. Gas,* 386 U.S. 129, 132 (1967); *Missouri-Kansas Pipe Line Co. v. United States,* 312 U.S. 502 (1941).

Consequently, the order denying intervention to California Canneries in the *Swift* case was appealable to this Court, and only to this Court, because it was a *final* order and therefore not appealable to a Court of Appeals. An attentive reading of the opinion in the *California Canneries* case shows that this is what the Court was holding. The argument there made by appellant to sustain the Court of Appeals' exercise of jurisdiction was that the appeal from the order denying intervention, though post-judgment, was "not 'an appeal from the final decree'; because the Canneries was not at the time of its appeal a party" to the suit (279 U.S. at 557, 558). The Court replied that it was immaterial that appellant appeared in the posture of an intervener. It observed that in *Continental Insurance Co. v. United States,* 259 U.S. 156, it had held that an appeal by one permitted to intervene was just like an appeal by one of the original parties, so far as appealability to this Court was concerned (p. 559). It further observed that it had been held that "in cases where the appeal was taken direct to this Court from the final decree in the trial court, every appeal *thereafter* taken in the cause was necessarily also to this Court" (p. 559), citing *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.,* 249 U.S. 134, 140 (1919). There the appeal had been taken by interveners from

an order rejecting claims presented pursuant to and following a final decree.

Moreover, referring again to the quoted passage from *California Canneries* and particularly the sentence,

> "Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller,* 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree",

it will be seen that the only authority cited is *Collins v. Miller.* But *Collins v. Miller* was merely an attempted appeal from orders which the Court held were not final (on petition for *habeas corpus* and certiorari) and where there was no statute relating to interlocutory appeal. The Court there merely expressed the then policy of the law not to permit interlocutory appeals. That, however, was merely a statement concerning the policy expressed in legislative mandate. The vice in the government's position here is that it would elevate this quondam legislative policy to one of permanent Constituitional prohibition, or, indeed, to some fundamental of the *lex naturae.* By the Interlocutory Appeals Act of 1958 Congress made a sharp break with the old policy against interlocutory appeals. Such a break was the very purpose of the enactment.

If it be granted that the quoted sentence from *California Canneries,* although dictum, represented the views of this Court, *the views it represented* were in a *precise historical context, i.e., the state of the statutory law in 1925.* As said in *Ingersoll-Rand,* (320 F.2d at 516):

> "The basis for the Supreme Court's decision as stated in California Canneries is perfectly plain. It was that the Expediting Act amended the prior law and did away with appeals from interlocutory orders and decrees in anti-trust suits."

In short, the Expediting Act was enacted after the Evarts Act, and nothing in subsequent amendments, at least until the 1948 revision, showed any Congressional intention to effect a change.

And, further, *California Canneries* had nothing to say about interlocutory appeals under § 1292(b) because that procedure was 29 years in the future.

Whatever may be said about 1292(a), the case as to 28 U.S.C. 1292(b) is clear. It was enacted 55 years after the Expediting Act and 29 years after *California Canneries*. In *California Canneries* this Court was expressing a judgment on what Congress had done, not on what it could do or on the effect of what it would do 29 years later.

In the *Fisons* case the Seventh Circuit makes these very distinctions about the *California Canneries* case, saying:

> "None of these [government] arguments [opposing appealability under § 1292(b)] questions the wisdom of applying the 1958 Act to this type of case, or suggests any conflict between the language or the policy of the two statutes. In essence, it is the Government's position that the Expediting Act is an especially important statute which has been construed to mean a great deal more than it says, and specifically to foreclose interlocutory appeals; . . .
>
> "First, we note that the Expediting Act is just another statute. It has been on the books a long time and it deals with important litigation. But the statute itself commands no special respect today. It has been criticized by Supreme Court Justices and other scholars, and narrowly construed to permit a court of appeals to participate in appellate review of at least one civil antitrust case in which the Government was a party. We do not consider our appraisal of the question presented here as an intrusion on hallowed ground.
>
> "Second, we note the significant difference between this question and the issues raised by attempts to appeal from orders granting or denying preliminary injunctions pursuant to § 1292(a) of the Judicial Code. That section has a dramatically different history, as well as a significant difference in its language, from § 1292(b).
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> * * *
>
> "It is sufficient to note that the enactment of the Expediting Act in 1903 was a chapter in that history which had com-

> menced earlier, and that the enactment of § 1292(a) in 1948 was merely intended to codify preexisting law. * * * On the other hand, § 1292(b) was a brand new statute written in 1958 on a totally clean slate. Moreover, the text of § 1292(a) contains an exception 'where a direct review may be had in the Supreme Court' which arguably was intended to encompass all litigation covered by the Expediting Act. There is no comparable exception in § 1292(b). We do not consider the cases construing § 1292(a) applicable to § 1292(b). [p. 91,345]
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> * * *
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> "Moreover, as the history of § 1292(a) discloses, the enactment of the Expediting Act did eliminate the preexisting right to appellate review of certain interlocutory decrees. The statement to that effect in the Court's opinion cannot, therefore, be taken as an interpretation of the subsequently enacted statute, particularly since the 1958 statute is consistent with an expediting purpose, whereas the procedure condemned in *California Canneries* had a dilatory effect." (p. 91,346)

The *Fisons* case points to another reason why the *California Canneries* case is inapplicable. The appeal there was taken, not under any general statute, but under a special provision of the District of Columbia Code. In *Fisons* the court said (p. 91,346):

> "* * * *California Canneries* must be considered in its context. In 1929, when that case was decided, the section of the District of Columbia Code which had been invoked to sustain jurisdiction of an interlocutory appeal had no counterpart in the general statutes conferring jurisdiction on federal appellate courts in other circuits. It would have been most anomalous for Government antitrust litigation to follow one procedural route in the District of Columbia and a different route in the remainder of the country."

In the *Canneries* case this Court had expressly said (279 U.S. at 558, 559) that in antitrust cases the rules for the District of Columbia were the same as for the rest of the country:

"For the enforcement of the Anti-Trust Act within the District of Columbia, its Supreme Court has jurisdiction corresponding to that which is exercised by the federal district courts in the several districts; and the appellate jurisdiction of the Court of Appeals of the District corresponds to that of the several Circuit Courts of Appeals."

Brown Shoe and Other Cases Relied On by the Government.

The government, in opposition to our petition for certiorari, has relied heavily on a footnote in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962). But that case did not involve any question of appeal to a Court of Appeals. It was a direct appeal to this Court, and the only question about appealability was whether the appealed order was final. In a footnote, constituting a complete aside, it nearly quoted from *California Canneries* (370 U.S. at 305, fn. 9):

"Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree. *United States v. California Cooperative Canneries,* 279 U.S. 553, 558."

While *Brown Shoe* post-dates the enactment of § 1292(b) by about four years, the issue of jurisdiction of a Court of Appeals over an interlocutory appeal under 1292(b) was not involved, and the new Act was not before it.[17] Therefore *Brown Shoe* is no authority on that point. *Webster v. Fall,* 266 U.S. 507, 511 (1925); *Nashville Milk Co. v. Carnation Co.,* 355 U.S. 373, 376, 383 (1958); *United States v. More,* 3 Cranch (7 U.S.) 159, 172.

28 U.S.C. § 1292(b) is the latest expression of Congressional will. It is plain in its language and requires no interpretation from

17. The Solicitor General's brief in opposition to our petition for certiorari agreed (p. 8) that "petitioner correctly notes that the question of interlocutory appeal under Section 1292(b) was not before the Court in *Brown Shoe.*"

Indeed, much the same is true as respects appealability under § 1292(a), for that issue was not involved in *Brown Shoe* either, and the effect of the 1948 amendment was not before the Court.

history.[18] There are no chalk marks on the slate of history to obscure its meaning.

In his brief in opposition the Solicitor General also cited *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137 (1944); *United States Alkali Export Association v. United States*, 325 U.S. 196 (1944); and *DeBeers Mines v. United States*, 325 U.S. 212 (1945). None is in point. None involved an appeal to a Court of Appeals. *Allen Calculators* was an attempt to appeal to this Court an order it held not to be final; the sole question was whether the order was final. The *Alkali* and *DeBeers* cases were attempts to have this Court review interlocutory orders by common law certiorari to the district court.

The order of the court below in this case rested on the bare citation of its decision in *United States v. FMC Corp.*, 321 F.2d 534. That case rested on the citation of *California Canneries, Brown Shoe, Allen Calculators*, and the *Alkali* and *DeBeers* cases, and three lower court cases. One, *United States v. American Association of Composers, Authors & Pulishers*, 317 F.2d 90 (2 Cir. 1963), was promptly reversed in *Shenandoah Broadcasting Co. v. Ascap*, 375 U.S. 39 (1963). Another, *Missouri-Kansas Pipe Line Co. v. United States*, 108 F.2d 614, was a 1939 Third Circuit decision, and the Third Circuit's later decision in *Ingersoll-Rand* holds a 1292(a) order appealable to a Court of Appeals. The third, *National Association of Real Estate Boards v. United States*, 176 F.2d 631 (D.C. Cir. 1949), involved an interlocutory order of a kind not within § 1292(a) or its precursors and antedates § 1292(b).

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18. *Ex parte Collett*, 337 U.S. 55, 61 (1949): "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco v. Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

Similarly, the District of Columbia Circuit's ruling in *Farbenfabriken Bayer A.G. v. United States,* 1968 Trade Cas. ¶ 72,570, rested on the mere citation of *Brown Shoe,* the *California Canneries* case, and *National Association of Real Estate Boards v. United States.*

The Relief Offered to This Court by 28 U.S.C. § 1292(b) Is Desirable and Its Use Should Be Encouraged.

To permit Courts of Appeal jurisdiction in government antitrust cases over appeals from interlocutory orders of the important and controlling kind to which 28 U.S.C. 1292(b) applies would be an enormous service to this Court in lightening its burden and in enlisting the screening agency of intermediate appellate courts. Congress has given the courts a useful tool in § 1292(b). In response to the same submission in our petition for certiorari, the Solicitor General did not controvert that statement, rather he appeared to concede it, but he argued that these facts "would not justify ignoring the limitation in the Expediting Act." That statement reversed the correct question, which is whether the Expediting Act, enacted in 1903, should be interpreted to read into the Interlocutory Appeals Act enacted 55 years later, a limitation which is not there but which is sought to be derived from the entirely different history of Section 1292(a).

The brief in opposition added that it "would be anomalous for a court which is without jurisdiction to entertain an appeal from the final judgment to rule on a 'controlling question of law'—the standard in the Interlocutory Appeals Act—which could control the outcome of the case." In response to the identical argument the Seventh Circuit in the *Fisons* case answered thus:

> "Finally, we reject the Government's argument that it would be anomalous for a court of appeals to pass on controlling quesions of law in cases which are directly reviewable in the Supreme Court after the entry of final judgment. Whenever we consider a controlling question in any litigation, our views are subject to final revision by the Supreme Court." [p. 91,346]

Far from being anomalous interlocutory review by Courts of Appeals would be helpful. With its certiorari jurisdiction this Court would still have the last word. If the decision of the Court of Appeals appeared correct, this Court would be spared labor. If the decision appeared incorrect, this Court could review but with the valued benefit of the analysis of an appellate court. It would be spared details best suited to handling by other courts. For sound reasons such as these the Seventh Circuit concluded:

> "In balance, we are persuaded that the efficacious purpose of § 1292(b) to expedite the ultimate termination of protracted cases justifies its application in Government antitrust litigation as well as in other similarly complex matters." [p. 91,346]

The valuable aid of the Interlocutory Appeals Act in government antitrust cases should not be rejected upon an ambiguous history of another statute. The language of 1292(b) supports jurisdiction, and nothing in the purpose or history of 1292(b) or of the Expediting Act precludes it. Indeed, we respectfully suggest that the use of 1292(b) in government antitrust cases might well be affirmatively encouraged. Were trial courts to cast decisions in the form of interlocutory orders, the detail of such cases—so vital to correct decision but so unsuited to this Court's procedures and so burdensome to it—could be screened by Courts of Appeal, leaving to this Court the important matters that only it can definitively handle.

CONCLUSION

It is respectfully submitted that the order of the Court of Appeals denying the petition for permission to appeal under 28 U.S.C. § 1292(b) for lack of jurisdiction should be reversed and that the case should be remanded to that court with direction to act upon the merits of the petition for leave to appeal. Where

a court fails to exercise a discretion imposed on it by law, as with respect to allowing an appeal, in the erroneous belief that it lacks jurisdiction to do so, this Court on certiorari can direct it to do so. *In re 620 Church St. Corp.*, 299 U.S. 24, 26 (1936); *House v. Mayo*, 324 U.S. 42, 44 (1945), the direction being that it render a decision not in "any particular way" but only that it be made one way or the other. *Work v. Rives*, 267 U.S. 175, 184 (1925); *Brown v. Fletcher*, 237 U.S. 583 (1915).

Dated, San Francisco, California, April 21, 1972.

Respectfully submitted

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